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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
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6 SHARON KAY SHIPLEY, )  
7 Plaintiff, ) No. CV-09-3025-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on January 8, 2010 (Ct. Recs.  
15 15, 22). Attorney D. James Tree represents Plaintiff; Special  
16 Assistant United States Attorney Terrye Shea represents the  
17 Commissioner of Social Security. The parties have consented to  
18 proceed before a magistrate judge (Ct. Rec. 8.) Plaintiff filed a  
19 reply on December 28, 2009 (Ct. Rec. 25). After reviewing the  
20 administrative record and the briefs filed by the parties, the  
21 court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 22)  
22 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 15).

23 **JURISDICTION**

24 Plaintiff protectively filed an application for disability  
25 insurance benefits (DIB)(Tr. 95-96) and for supplemental security  
26 income (SSI) benefits on July 28, 2005 (Tr. 382-385), alleging  
27 disability as of December 30, 2004. The applications were denied  
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1 initially and on reconsideration. (Tr. 80-81 -- DIB; Tr. 84-87 --  
2 SSI).

3 Administrative Law Judge (ALJ) Riley J. Atkins held a hearing  
4 on May 14, 2008. Plaintiff, represented by counsel, and  
5 vocational expert Kathryn Heatherly testified (Tr. 29-58). The  
6 Commissioner acknowledges even though plaintiff had requested a  
7 hearing on both her SSI and DIB claims at the same time, the ALJ  
8 issued an unfavorable decision on the DIB claim alone, on June 11,  
9 2008 (Ct. Rec. 23 at 7,9 referring to the ALJ's decision at Tr.  
10 17-26). The Appeals Council denied review on December 31, 2008  
11 (Tr. 5-8). Therefore, the ALJ's decision became the final  
12 decision of the Commissioner, which is appealable to the district  
13 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action  
14 for judicial review pursuant to 42 U.S.C. § 405(g) on February 26,  
15 2009 (Ct. Rec. 1,4).

#### 16 STATEMENT OF FACTS

17 The facts have been presented in the administrative hearing  
18 transcripts, the ALJ's decision, the briefs of both Plaintiff and  
19 the Commissioner, and are summarized here.

20 Plaintiff was 54 years old at the hearing (Tr. 32). She has  
21 a high school education and earned an associate's degree in  
22 paralegal studies in April of 2006, with honors (Tr. 32-33).  
23 Plaintiff has worked as a records clerk, underwriter, an in  
24 customer service (Tr. 50-51). Plaintiff testified she has  
25 suffered from depression "pretty much all of my adult life" (Tr.  
26 40). Beginning in late 1997, plaintiff began caring for her two  
27 granddaughters in the home she shares with her husband because  
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1 their daughter was unable to care for them (Tr. 43-44). Prior to  
2 plaintiff's date last insured, she cared for the girls, then  
3 approximately ages 8 and 11 (Tr. 44). At times this included  
4 overseeing their home schooling, Mary Kate in the fall of 2005,  
5 and Angelica for one year in 2006-2007 (Tr. 47-49). Plaintiff  
6 worked online 4-6 hours and at times 6-8 hours daily, with breaks,  
7 from 2003 until April of 2006, a period after onset and prior to  
8 her date last insured, to earn her associate's degree (Tr. 46-47).

#### 9 SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act (the "Act") defines "disability"  
11 as the "inability to engage in any substantial gainful activity by  
12 reason of any medically determinable physical or mental impairment  
13 which can be expected to result in death or which has lasted or  
14 can be expected to last for a continuous period of not less than  
15 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
16 Act also provides that a Plaintiff shall be determined to be under  
17 a disability only if any impairments are of such severity that a  
18 plaintiff is not only unable to do previous work but cannot,  
19 considering plaintiff's age, education and work experiences,  
20 engage in any other substantial gainful work which exists in the  
21 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
22 Thus, the definition of disability consists of both medical and  
23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
24 (9<sup>th</sup> Cir. 2001).

25 The Commissioner has established a five-step sequential  
26 evaluation process for determining whether a person is disabled.  
27 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
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1 is engaged in substantial gainful activities. If so, benefits are  
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
3 not, the decision maker proceeds to step two, which determines  
4 whether plaintiff has a medically severe impairment or combination  
5 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
6 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination  
8 of impairments, the disability claim is denied. If the impairment  
9 is severe, the evaluation proceeds to the third step, which  
10 compares plaintiff's impairment with a number of listed  
11 impairments acknowledged by the Commissioner to be so severe as to  
12 preclude substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
14 App. 1. If the impairment meets or equals one of the listed  
15 impairments, plaintiff is conclusively presumed to be disabled.  
16 If the impairment is not one conclusively presumed to be  
17 disabling, the evaluation proceeds to the fourth step, which  
18 determines whether the impairment prevents plaintiff from  
19 performing work which was performed in the past. If a plaintiff  
20 is able to perform previous work, that Plaintiff is deemed not  
21 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
22 At this step, plaintiff's residual functional capacity (RFC)  
23 assessment is considered. If plaintiff cannot perform this work,  
24 the fifth and final step in the process determines whether  
25 plaintiff is able to perform other work in the national economy in  
26 view of plaintiff's residual functional capacity, age, education  
27 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
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1 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

2 The initial burden of proof rests upon plaintiff to establish  
3 a *prima facie* case of entitlement to disability benefits.

4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*

5 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
6 met once plaintiff establishes that a physical or mental

7 impairment prevents the performance of previous work. The burden

8 then shifts, at step five, to the Commissioner to show that (1)

9 plaintiff can perform other substantial gainful activity and (2) a

10 "significant number of jobs exist in the national economy" which

11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>

12 Cir. 1984).

#### 13 STANDARD OF REVIEW

14 Congress has provided a limited scope of judicial review of a

15 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

16 the Commissioner's decision, made through an ALJ, when the

17 determination is not based on legal error and is supported by

18 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995

19 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.

20 1999). "The [Commissioner's] determination that a plaintiff is

21 not disabled will be upheld if the findings of fact are supported

22 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572

23 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence

24 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d

25 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.

26 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);

27 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

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1 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
2 evidence as a reasonable mind might accept as adequate to support  
3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
4 (citations omitted). "[S]uch inferences and conclusions as the  
5 [Commissioner] may reasonably draw from the evidence" will also be  
6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
7 On review, the Court considers the record as a whole, not just the  
8 evidence supporting the decision of the Commissioner. *Weetman v.*  
9 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
10 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to  
12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
13 evidence supports more than one rational interpretation, the Court  
14 may not substitute its judgment for that of the Commissioner.  
15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
16 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
17 substantial evidence will still be set aside if the proper legal  
18 standards were not applied in weighing the evidence and making the  
19 decision. *Browner v. Secretary of Health and Human Services*, 839  
20 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
21 evidence to support the administrative findings, or if there is  
22 conflicting evidence that will support a finding of either  
23 disability or nondisability, the finding of the Commissioner is  
24 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
25 1987).

#### 26 ALJ'S FINDINGS

27 At the outset the ALJ found plaintiff was insured for DIB  
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1 purposes through December 31, 2005 (Tr. 19). At step one he found  
2 plaintiff has not engaged in substantial gainful activity since  
3 onset (Tr. 18). At steps two and three, the ALJ found that  
4 plaintiff suffers from obesity, diabetes mellitus, and  
5 depression, in partial remission, impairments that are severe but  
6 which do not alone or in combination meet or medically equal a  
7 Listing impairment (Tr. 19). The ALJ found plaintiff less than  
8 completely credible (Tr. 21). At step four, relying on the  
9 vocational expert, the ALJ found plaintiff is able to perform her  
10 past relevant work as a records clerk, customer service  
11 representative, and underwriter (Tr. 25). Because plaintiff can  
12 perform past relevant work, step five was unnecessary. The ALJ  
13 found plaintiff is not disabled as defined by the Social Security  
14 Act (Tr. 25-26).

#### 15 ISSUES

16 Plaintiff first alleges the ALJ erroneously failed to  
17 consider her concurrently filed SSI and DIB claims together. The  
18 ALJ addressed the only DIB claim. She asks the Court to order, at  
19 a minimum, remand for consideration of both claims (Ct. Rec. 16 at  
20 12-13). The Commissioner's answer is two-fold: (1) the Court  
21 lacks jurisdiction because there has been no final agency decision  
22 on the SSI claim, and (2) plaintiff failed to exhaust her  
23 administrative remedies as required (Ct. Rec. 23 at 2,7-11).

24 Next plaintiff alleges the Commissioner erred as a matter of  
25 law when he failed to properly weigh the evidence of psychological  
26 and medical limitations, and fully develop the record. Last,  
27 plaintiff asserts the ALJ erred when he failed to include all of  
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1 her limitations in the hypothetical question he asked the VE (Ct.  
2 Rec. 16 at 10). The Commissioner answers because the ALJ  
3 performed each task properly, the Court should affirm (Ct. Rec. 16  
4 at 12-13).

5 **DISCUSSION**

6 A. Jurisdiction

7 Absent a final agency decision with respect to plaintiff's  
8 SSI claim, the Commissioner is correct the Court lacks  
9 jurisdiction to reverse and remand for the ALJ's failure to  
10 consider the SSI and DIB claims simultaneously. See 42 U.S.C. §  
11 405(g) and (h).

12 20 C.F.R. § 416.1429 provides that an applicant dissatisfied  
13 with the reconsideration determination may request a hearing  
14 before an ALJ. Here, after the reconsideration stage by the  
15 agency, plaintiff requested a hearing on both the DIB and SSI  
16 claims. The parties agree that at the hearing and in his written  
17 decision, the ALJ repeatedly and specifically limited his  
18 consideration to the DIB claim (Ct. Rec. 16 at 13, Ct. Rec. 23 at  
19 9). The parties are correct. At the beginning of the hearing the  
20 ALJ stated:

21 "This is only a Title II case, it's a Disability Insurance  
22 Benefits case. Your date last insured is December 31, 2005." In  
23 response, counsel<sup>1</sup> pointed out there was a "long break in her  
24 [plaintiff's] employment," and did not correct the ALJ's apparent  
25 mistake (Tr. 30). The ALJ asked plaintiff questions relating to

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27 <sup>1</sup>Plaintiff's counsel on appeal is not the same as at the  
28 hearing.



1 the relevant DIB time frame and directed counsel to do the same.  
2 Counsel complied without comment and did not mention the SSI claim  
3 (See Tr. 36, 38-40, 45-48).

4 An applicant dissatisfied with an ALJ's decision may seek  
5 review by the Appeals Council (20 C.F.R. § 416.1467). Judicial  
6 review is limited to consideration of the Commissioner's final  
7 decision (C.F.R. §§ 416.1481; 422.210). Plaintiff sought review  
8 but the Appeals Council had no final decision by an ALJ on the SSI  
9 claim to review. Because the Court's review is limited to final  
10 agency decisions, and there is not yet such a decision on the SSI  
11 claim, the Court lacks jurisdiction to consider plaintiff's SSI  
12 claim or to remand on the basis plaintiff asks.

13 B. Standards for weighing opinion evidence

14 In social security proceedings, the claimant must prove the  
15 existence of a physical or mental impairment by providing medical  
16 evidence consisting of signs, symptoms, and laboratory findings;  
17 the claimant's own statement of symptoms alone will not suffice.  
18 20 C.F.R. § 416.908. The effects of all symptoms must be  
19 evaluated on the basis of a medically determinable impairment  
20 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
21 416.929. Once medical evidence of an underlying impairment has  
22 been shown, medical findings are not required to support the  
23 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
24 341, 345 (9<sup>th</sup> Cr. 1991).

25 A treating physician's opinion is given special weight  
26 because of familiarity with the claimant and the claimant's  
27 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>

1 Cir. 1989). However, the treating physician's opinion is not  
2 "necessarily conclusive as to either a physical condition or the  
3 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
4 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
5 a treating physician than an examining physician. *Lester v.*  
6 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
7 weight is given to the opinions of treating and examining  
8 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
9 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
10 physician's opinions are not contradicted, they can be rejected  
11 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
12 If contradicted, the ALJ may reject an opinion if he states  
13 specific, legitimate reasons that are supported by substantial  
14 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44  
15 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

16 In addition to the testimony of a nonexamining medical  
17 advisor, the ALJ must have other evidence to support a decision to  
18 reject the opinion of a treating physician, such as laboratory  
19 test results, contrary reports from examining physicians, and  
20 testimony from the claimant that was inconsistent with the  
21 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
22 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
23 Cir. 1995).

24 C. Psychological limitations

25 At step two, the ALJ found depression is plaintiff's sole  
26 severe psychological impairment (Tr. 19).

27 Plaintiff alleges the ALJ erred by rejecting without  
28 explanation a diagnosis rendered in November of 2005, one month

1 before her date last insured, by examining psychologist Lawrence  
2 Lyon, Ph.D. (Ct. Rec. 16 at 14-15, referring to Tr. 192-197). As  
3 the Commissioner correctly observes, the ALJ assessed three  
4 psychological limitations, all consistent with Dr. Lyon's opinion  
5 (Ct. Rec. 23 at 11-14). The ALJ found plaintiff's ability to  
6 maintain concentration for extended periods, interact with the  
7 public, and respond appropriately to changes in the work setting  
8 are moderately limited by depression (Tr. 20-21). These  
9 limitations are consistent with Dr. Lyon's opinion and test  
10 results.

11 Plaintiff apparently argues the ALJ should have adopted all  
12 of Dr. Lyon's diagnosed conditions. In addition to depression,  
13 Dr. Lyon diagnosed rule out bipolar disorder, nos, generalized  
14 anxiety disorder, and social phobia, provisional (Ct. Rec. 16 at  
15 14-15, referring to Tr. 196). Plaintiff alleges the ALJ  
16 additionally erred by failing to adopt these additional diagnoses  
17 essentially repeated by reviewing psychologist James Bailey, Ph.D.  
18 (Ct. Rec. 16 at 14-15), referring to Tr. 205, 207). The  
19 Commissioner answers the ALJ's step two finding plaintiff's sole  
20 severe psychological impairment is depression, and his RFC which  
21 includes three moderate impairments attributable to depression,  
22 are both fully supported by the record (Ct. Rec. 23 at 11-12). To  
23 the extent plaintiff argues the ALJ should have accepted Dr.  
24 Lyon's rule out diagnoses of bipolar disorder, nos, generalized  
25 anxiety disorder, and social phobia, provisional, the record does  
26 not support her argument. Even if the ALJ accepted the additional  
27 diagnoses, there is no evidence they would have caused more than a  
28 minimal impact on plaintiff's ability to work, as discussed more

1 fully below; as a result, error if any by the ALJ with respect to  
2 this issue is harmless.

3       The ALJ relied on several factors when he determined  
4 plaintiff's mental RFC during the relevant period. He observed  
5 plaintiff earned a GPA of 4.0 in college courses, working online  
6 between 4 and 8 hours daily, with breaks. At the same time, she  
7 continued raising two grandchildren, approximately ages 8 and 11  
8 during the relevant period, with her disabled husband in their  
9 home. The ALJ noted plaintiff told Dr. Lyon about five weeks  
10 before her date last insured she wanted to do a lot of research  
11 working as a paralegal after she finished her current online  
12 associate's degree program in paralegal studies (Tr. 23-24).  
13 These reasons are supported in the record. The evidence does not  
14 support plaintiff's allegations of more severe psychological  
15 impairments.

16       Additionally, the ALJ adopted *greater* limitations than Dr.  
17 Bailey. As noted, the ALJ assessed moderate limitations in three  
18 areas (Tr. 21). Dr. Bailey, on the other hand, assessed solely of  
19 a moderate limitation in social functioning (Tr. 212). Plaintiff  
20 further fails to note Dr. Bailey opined she is not fully credible  
21 due to an allegedly poor ability to persist, a complaint  
22 contradicted by the ability to spend a great deal of time caring  
23 for two children and attending college online, both activities  
24 more consistent with the ability to work than with disabling  
25 impairment (Tr. 200).

26       When the ALJ weighed the opinions of Drs. Lyon, Bailey, and  
27 others, he evaluated plaintiff's credibility and, like Dr. Bailey,  
28 found plaintiff less than fully credible (Tr. 21). Credibility

1 determinations bear on evaluations of medical evidence when an ALJ  
2 is presented with conflicting medical opinions or inconsistency  
3 between a claimant's subjective complaints and diagnosed  
4 condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir.  
5 2005).

6 It is the province of the ALJ to make credibility  
7 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
8 1995). However, the ALJ's findings must be supported by specific  
9 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
10 Cir. 1990). Once the claimant produces medical evidence of an  
11 underlying medical impairment, the ALJ may not discredit testimony  
12 as to the severity of an impairment because it is unsupported by  
13 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
14 1998). Absent affirmative evidence of malingering, the ALJ's  
15 reasons for rejecting the claimant's testimony must be "clear and  
16 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
17 "General findings are insufficient: rather the ALJ must identify  
18 what testimony not credible and what evidence undermines the  
19 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
20 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

21 Some of the factors the ALJ relied on when assessing  
22 credibility include: (1) plaintiff's testimony in 2008 she  
23 suffered chronic diarrhea since 2002 is not fully credible because  
24 medical records do not document these complaints; (2) plaintiff  
25 told Dr. Lyon that in the past, her depression eventually improved  
26 on psychotropic medication, so she stopped taking it; (3) records  
27 show "relatively little mental health treatment during the  
28 relevant period"; and (4) reportedly significant problems with

1 concentration are undermined by the ability to earn "straight A's"  
2 while obtaining a college degree in paralegal studies, and with  
3 plaintiff's statement (about two months before her date last  
4 insured) she had "some leads for employment" with her new  
5 training. (Tr. 22-23, citing Tr. 193-195, 244, 250-252, 255.)  
6 The ALJ found plaintiff's activities included raising two  
7 grandchildren until July of 2007 while simultaneously working  
8 toward earning an associate's degree, and at times volunteering at  
9 school and supervising home schooling. The ALJ found these  
10 activities undermined plaintiff's claimed disabling limitations  
11 (Tr. 23-24, referring to Tr. 192-193, 195-196).

12 The ALJ's reasons for finding plaintiff less than fully  
13 credible are clear, convincing, and fully supported by the record.  
14 *See Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
15 2002)(proper factors include inconsistencies in plaintiff's  
16 statements, inconsistencies between statements and conduct, and  
17 extent of daily activities). Noncompliance with medical care or  
18 unexplained or inadequately explained reasons for failing to seek  
19 medical treatment also cast doubt on a claimant's subjective  
20 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
21 2d 597, 603 (9<sup>th</sup> Cir. 1989).

22 Because the ALJ's RFC is consistent with the limitations  
23 assessed by Dr. Lyon and by his [the ALJ's] credibility  
24 assessment, plaintiff's argument fails.

25 Plaintiff next alleges the ALJ failed to properly credit the  
26 opinion of "long-time" treating psychiatrist Kimberly Humann,  
27 M.D., in 2008, that Ms. Shipley's depression prevented her from  
28 sustaining employment (Ct. Rec. 16 at 16-17, 19). The

1 Commissioner responds the ALJ correctly gave Dr. Humann's opinions  
2 little weight because she began treating plaintiff several months  
3 after her insured status expired (Ct. Rec. 23 at 19-21).

4 The Commissioner is correct. Dr. Humann's treatment began  
5 on May 10, 2006, five months after Ms. Shipley's date last insured  
6 (Tr. 283). Dr. Humann became "long treating" only well after Ms.  
7 Shipley's last insured date. In her first record Dr. Humann noted  
8 plaintiff "has been out of treatment health services despite a  
9 long history of depression, due to lack of coverage" and has  
10 "always done well in school and on the job" (Tr. 283-284).

11 In the 2008 opinion plaintiff cites, treating therapist  
12 Steven Woolpert, M.S., opined plaintiff's mental impairments  
13 "combined with significant physical/medical conditions" markedly  
14 limited her ability to sustain activity for a "normal  
15 workday/workweek" (Tr. 293). In the same report, Dr. Humann  
16 agreed with Mr. Woolpert and further opined plaintiff was unable  
17 to sustain work due to mental illness, specifically severe  
18 depression and anxiety which only partially responded to  
19 medication (Tr. 293).

20 Their report is dated March 11, 2008 -- more than two years  
21 after plaintiff's insured status expired (Tr. 291-293). The  
22 Commissioner is correct. The ALJ was not required to credit  
23 opinions rendered after plaintiff's last insured date with respect  
24 to her DIB claim, because the claimant has the burden of proving  
25 that he [or she] became disabled prior to the expiration of  
26 disability insured status; none of the exceptions apply. See  
27 *Flaten v. Secretary of Health and Human Servs.*, 44 F.2d 1453, 1463  
28 (9<sup>th</sup> Cir. 1995); *Macri v. Chater*, 93 F.3d 540, 545 (9<sup>th</sup> Cir. 1996).

1  
2 Plaintiff similarly alleges the ALJ failed to properly credit  
3 the opinion of long-time treating therapist Mr. Woolpert (Ct. Rec.  
4 16 at 17-19). The Commissioner answers because Mr. Woolpert is  
5 not an acceptable medical source as defined by the regulations,  
6 the ALJ's reasons for rejecting his opinion were appropriately  
7 germane (Ct. Rec. 23 at 21-23).

8 Mr. Woolpert's earliest record, an intake evaluation dated  
9 May 27, 2005, is within the relevant period because it took place  
10 six months before plaintiff's insured status expired (Tr. 158-  
11 161). Mr. Woolpert opined the effectiveness of prescribed  
12 psychotropic medication is "not yet established" (Tr. 160). He  
13 recommended therapy, and assessed two marked plus five moderate  
14 limitations (Tr. 159-161).

15 The ALJ observes in July of 2005, Mr. Woolpert assessed a GAF  
16 of 50, indicating serious impairment in social and occupational  
17 functioning (Tr. 22, referring to Tr. 264).

18 One of the reasons the ALJ rejected Mr. Woolpert's assessed  
19 limitations is that the therapist relied on plaintiff's level of  
20 functioning in 2008 rather than prior to her last insured date of  
21 December 31, 2005, as required (Tr. 25, citing Exhibit 9F/133 at  
22 Tr. 273). The ALJ is correct. Mr. Woolpert notes "[w]ent over  
23 mental/emotional, physical problems currently experiencing and how  
24 affected her efforts to try out volunteering and home/online job  
25 possibilities. Currently feels inadequate to do these kinds of  
26 work" (Tr. 273). As the ALJ also points out, at the same  
27 appointment Mr. Woolpert "reported the claimant had a current  
28 interest in deferring her school loan based on disability" (Tr.



25, referring to Tr. 273). As indicated, the ALJ found plaintiff less than fully credible. Applying even the higher standard applicable to acceptable medical sources, the ALJ's reasons for rejecting these contradicted opinions are specific, legitimate, and supported by the record.

D. ALJ's duty to develop the record

Plaintiff alleges the ALJ erred by failing to recontact treating psychiatrist Dr. Humann (Ct. Rec. 16 at 16).

As the Commissioner accurately answers, the ALJ is not required to recontact a doctor unless the report is ambiguous or insufficient for making a determination. (Ct. Rec. 23 at 19-21), citing *Mayes v. Massanari*, 276 F.3d 453,459 (9<sup>th</sup> Cir. 2001). Because the record is sufficient to determine disability, plaintiff's claim fails.

E. Physical limitations

Plaintiff contends at step two the ALJ should have found she suffers from the severe impairments assessed by her "longtime" primary care doctor, William Bothamley, M.D., in addition to those he did assess, diabetes mellitus and obesity (Ct. Rec. 16 at 19). Plaintiff alleges the ALJ additionally erred when he rejected Dr. Bothamley's opinion in March of 2008 that pain and fatigue prevent Ms. Shipley from sustaining work on a regular, full-time basis (Ct. Rec. 16 at 19-25, referring to Tr. 294-296). The Commissioner responds the ALJ's reasons for rejecting this contradicted opinion are specific, legitimate and supported by the record (Ct. Rec. 23 at 15).

Until plaintiff saw Dr. Bothamley on September 23, 2005, about three months before her last insured date, Carolyn O'Connor,

1 M.D., generally treated plaintiff (Id.). In the Court's view,  
2 three months of treatment during the relevant period does not make  
3 Dr. Bothamley a "longtime" primary care doctor.

4 At step two the ALJ found Dr. Bothamley's diagnosed  
5 conditions of arthritis, chronic pain, probable sleep apnea and  
6 varicose veins in both legs, are not severe (Tr. 19, 22-23). He  
7 observes plaintiff told Dr. Bothamley<sup>2</sup> on October 7, 2005 she had  
8 "some leads for employment positions out of town with her new  
9 training" and volunteering at her granddaughter's school (Tr. 23,  
10 referring to Tr. 250), indicating her own belief she was able to  
11 work and did not suffer the multiple dire conditions assessed by  
12 Dr. Bothamley.

13 On March 17, 2008, Dr. Bothamley opined plaintiff was unable  
14 to work due to pain and fatigue, work would cause her condition to  
15 deteriorate, physical activity exacerbates pain, and desk work  
16 increases upper body pain. He predicted plaintiff would miss 4 or  
17 more days of work each month. As a result of fatigue, swollen  
18 feet, and sleep apnea, plaintiff "has to lie down often" for 20  
19 minutes to two hours (Tr. 294).

20 The ALJ found Dr. Bothamley's opinion is inconsistent with  
21 his own treatment records because the latter do not document  
22 significant limitations or treatment during the relevant period,  
23 the opinion was rendered more than two years after plaintiff's  
24 last insured date, and it is inconsistent with plaintiff's

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25  
26 <sup>2</sup>The ALJ mistakenly attributes plaintiff's statements to  
27 Dr. Bothamley. The record shows plaintiff shared news of her  
28 employment leads and volunteer activities on October 7, 2005, with  
Mr. Woolpert rather than Dr. Bothamley (Tr. 250). The error  
appears harmless.

1 extensive activities (Tr. 24, referring to Exhibits 1E, 11F/215-  
2 217 and 12F).

3 Each of the ALJ's reasons is specific, legitimate and fully  
4 supported by the record. See *Lester v. Chater*, 81 F. 3d 821, 830-  
5 831 (9<sup>th</sup> Cir. 1995)(the ALJ must make findings setting forth  
6 specific, legitimate reasons for rejecting the treating  
7 physician's contradicted opinion). The ALJ properly weighed Dr.  
8 Bothamley's contradicted opinion.

9 The ALJ is responsible for reviewing the evidence and  
10 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
11 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
12 trier of fact, not this court, to resolve conflicts in evidence.  
13 *Richardson*, 402 U.S. at 400. The court has a limited role in  
14 determining whether the ALJ's decision is supported by substantial  
15 evidence and may not substitute its own judgment for that of the  
16 ALJ, even if it might justifiably have reached a different result  
17 upon de novo review. 42 U.S.C. § 405 (g).

18 The ALJ's assessment of the evidence of plaintiff's physical  
19 limitations, including his assessment of her credibility, is  
20 supported by the record and free of legal error. Plaintiff's  
21 final argument, that the ALJ failed to include all of her  
22 limitations when he questioned the VE, is answered by the  
23 foregoing analysis.

#### 24 CONCLUSION

25 Having reviewed the record and the ALJ's conclusions, this  
26 court finds that the ALJ's decision is free of legal error and  
27 supported by substantial evidence.

#### 28 IT IS ORDERED:

ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

1 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is  
2 **GRANTED.**

3 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is  
4 **DENIED.**

5 The District Court Executive is directed to file this Order,  
6 provide copies to counsel for Plaintiff and Defendant, enter  
7 judgment in favor of Defendant, and **CLOSE** this file.

8 DATED this 10<sup>th</sup> day of February, 2010.

9  
10 s/ James P. Hutton  
11 JAMES P. HUTTON  
12 UNITED STATES MAGISTRATE JUDGE  
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